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No. 94-314

In the

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE,
NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS' ASSOCIATION.
CHARLES VAUGHAN AND JAMES PETERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL CONGRESS FOR MEN AND CHILDREN, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE,
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Respondents

On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Congress for Men and Children, Inc., an international group of associations and organizations concerned with protecting and advancing the rights of men and children, respectfully hereby moves for leave to file the attached brief *amicus curiae*. The attorney for the plaintiffs has consented. Two attorneys for the respondents have rejected our request for their permission to file the brief. The

stated reason for both refusals is identical and is ". . .the filing of an Amicus Curiae brief by you would be primarily for political purposes and will not bring to the attention of the Court matters which will not be submitted by the parties." Mr. Vaughn refused permission claiming the action was a frivolous lawsuit.

This brief supports the plaintiffs' petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The National Congress for Men and Children, Inc. has both a long and broad experience of dealing with litigation at all levels affecting family life, children's safety and security, their development, and the appropriate and effective roles of both men and women in family and society. We believe this case represents a grave and serious potential for damage to families, children, men, and women. The state already has unparalleled power to intervene in family life and exercises that power more frequently and more intrusively than ever before in our history. It is true that the involvement of the state has an ostensible benevolent intent. Yet it is also true that government may be most feared when it is at its most beneficent. If government is to be helpful and truly supportive of family life, children, and men and women, there must be some checks and balances as the framers of our constitution recognized and built into the very fabric of our institutions.

We are also very cognizant that family life and the values of family are in a state of flux and potential change. It is not an exaggeration to consider the possibility that the traditional family has broken down and may, indeed, disappear. This appears dangerous for our nation to many. Our system of justice also already has the prosecutor firmly established as the single most powerful individual in our justice system. The pursuit of justice rests most firmly on the character and

personality of our prosecutors and other agents of government. So long as prosecutors are persons of probity, wisdom, and fairness, we may be confident that citizens will be dealt with fairly in most instances. Fairness is what American citizens most want and expect from their justice system.[1] Obedience to the law is nurtured and fostered by the belief in fairness and the actual experience of fairness.

However, in the event the weakness of humanity manifests itself in the person of a prosecutor or agent of government, there must be checks and balances to offer opportunity for accountability, control, and redress of inequity or injustice. If, in this instant case, the decision of the Seventh Circuit is allowed to stand, it is our fear and belief that one of the last, if not the last, checks and balances to hold prosecutors accountable for a proper pursuit of justice, the requirement to be truthful and fair, will be destroyed. Should this be the case, the liberties and rights of all citizens are exposed to the frailty of human character with no shield or defense.

We do not understand the objection of respondents that filing this brief is for political purposes and therefore they would deny us access to the system of justice. To deny citizens access to the court for this reason appears to be the same reasoning of King George III to deny the colonies access to parliament and thus the King's justice, requiring obedience without opportunity to speak in opposition. All appeals to the system of justice of any nation state are in the final analysis political actions. The District judge rejected the defendants's motion to find the suit a frivolous action and

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[1] Tyler, T. R. (1990). Why people obey the law. New Haven: Yale University Press.

ruled it was not, contrary to Mr. Vaughn's reason for refusing our request for permission.

For the foregoing reason, the National C gress for Men and Children, Inc. respectfully urges the Court to accept and file the enclosed brief *amicus curiae* in support of the petitioners, Ralph Underwager and Hollida Wakefield.

Respectfully submitted,

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On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

Brief of the
National Congress for Men and Children, Inc.
as *Amicus Curiae*
in support of Petitioners

Interest of the Amicus Curiae

This *amicus curiae* brief is submitted by the National Congress for Men and Children, Inc, a coalition of over 100 organizations which support father's rights, men's rights and divorce reform in North America. The National Congress was originally formed in 1980 in Houston, TX, and now has thousands of members in the United States and Canada. It is a national nonprofit organization working to reduce gender discrimination in society and family courts. The members are primarily men, women, and their families who are struggling to maintain and increase their involvement in their children's lives and to remove cultural and legal impediments to such involvement. The mission of the National Congress for Men and Children is to serve as a national organization to assist local and state efforts compatible with the goal of assisting parents who choose to remain actively involved in their children's lives regardless of marital status. We encourage active parental involvement, including emotional and financial support by both parents. Moreover, we assert that the best interest of children demands that custody be eliminated as an issue in divorce and that the parent child relationship be severed only by a constitutionally sound proceeding, requiring clear and convincing evidence of child abuse or neglect.

Background

The Nature of the Problem

This case of *Underwager and Wakefield, Plaintiffs-Appellants v. Anna Salter, et al., Defendants-Appellees*, is not an ordinary, run-of-the-mill defamation action. It has implications and potential consequences for the entire system of justice and could, if permitted to stand as it now is with the

Seventh Circuit decision, obstruct and impede the intents and purposes of the U. S. Supreme Court evident in a number of rulings. We write because we believe, as the Brief of *Amici Curiae* of the American Society of Law, Medicine, and Ethics, et al. in the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* declared ". . .as a general matter. scientist's ability to be of assistance to judges and juries in determining a wide range of issues is threatened by the opinions of the lower courts in this case (p. 1)". If the decisions of the lower courts in this case are allowed to stand, we believe the consequence will be that scientists will not be willing to assist the justice system with scientific testimony because of the danger of grievous harm to reputation, career, and work.

As the *Amicus Curiae* Brief of the Carnegie Commission on Science, Technology, and Government in *Daubert v. Merrell Dow* stated "Recent developments both in law and science have conspired to bring increasingly complex scientific issues before the courts for resolution" (p. 2). Some of the most difficult, complex, and emotionally demanding issues the courts are dealing with, in which credible scientific knowledge is often crucial, involve the relationships between men and women and children and the state. Family law includes issues of divorce, domestic violence, custody of children, competence, adoption, birth control, and abortion. Criminal law includes sexual and physical child abuse, rape, sexual harassment, assault, and the criminalization of many sexual behaviors. Tort law now includes claims of sexual harassment and battering as a basis for overturning contracts and agreements made years before. Many states have changed statutes of limitations to permit actions based on claims of recovered repressed memories. Factual information about these issues that is reliable and trustworthy is hard to come by and consequently there is a significant danger that unsupported speculation may fill in the blanks without anyone being aware of it.

In all of these issues the testimony of scientists or other experts is often the major portion of the evidence produced by either adversary. The Federal Rules of Evidence appear to have had the effect of widening the scope and applicability of expert opinion and increasing the frequency of the use of experts in attempting to resolve very thorny and difficult disputes. The National Congress for Men and Children is deeply involved in those issues where men and children are involved in litigation of all sorts and where their rights as individuals and citizens are at issue. The members of the National Congress have had much experience dealing with inept, biased, erroneous, or ill-founded expert testimony in litigation in the areas of our concern. Therefore, we welcomed the recent (1993) *Daubert v. Merrell Dow* decision which provides guidance to the courts on admissibility of what is purported to be scientifically based testimony. We believed this decision would greatly improve the ability of the courts to separate what is scientifically sound from what is not when dealing in the areas of greatest concern to us.

Thus far some 40 cases citing *Daubert* appear to be coming down mainly on the side of excluding weak or inadequately supported testimony from being admitted. It seems likely that the Daubert decision may well result in what *Richardson* (1994) characterized as ". . .a revolution in U. S. expert evidence law." and *Underwager and Wakefield* (1993) termed a ". . .new paradigm shift for expert testimony." The intent of the Supreme Court clearly was to remove any confusion related to the Federal Rules of Evidence and the Frye test, which is now supplanted, and assure the availability to finders of fact of sound and credible scientific information.

The lower court opinions citing *Daubert* demonstrate a clear, emerging trend. The courts take their new "gatekeeper" role assigned by *Daubert* very seriously. The courts have used

Daubert to reject scientifically unsound evidence. While most of the cases have involved toxic tort and traditional tort cases, there have been several dealing with the kind of expert testimony the National Congress for Men and Children is most concerned about, that is, testimony by mental health professionals, psychiatrists, psychologists, and social workers, that is most often found in the cases dealing with the family, parent, child, and abuse and neglect issues. Testimony based on weakly supported psychological theories has been excluded. This has included recognition of suggestibility in child abuse cases so hypnotically refreshed testimony has been excluded. The use of post-traumatic stress disorder and the child abuse accommodation syndrome to buttress, by inference, claims of prior abuse has also been excluded by a *Daubert* analysis. We welcome this development of case law recognizing the *Daubert* decision and rejoice in the seriousness with which the judiciary appears to be addressing its new role as the gatekeeper for what is admissible as scientific evidence.

Another Supreme Court ruling that is of interest here is *Ake v. Oklahoma* (470 U. S. 68, 105 S. Ct. 1087, 84.L.Ed. 2d 53 (1985)) in which the decision establishes that it is the right of a defendant to have competent mental health expertise available to aid in the defense against an accusation. This decision and subsequent application in case law suggests a more active role for the expert in consulting with the defense and supporting the defendant's claims than is often understood (*Rachlin*, 1988). The decision, for all practical purposes, establishes the model for mental health professionals involvement in criminal trials (*Applebaum*, 1987). The constitutional right to effective assistance of counsel includes "effective aid in preparation and trial of the case. "(*Powell v. Alabama*, 287 U. S. 45, 71 (1932). The use of experts to assist in the preparation of a defense falls squarely within the right of counsel (*United States v. Theriault*, 440 F.

2d 713 (5th Cir. 1971) cert. den. 411 U. S. 984 (1973); *United States v. Curant*, 545 F. 2d 823, 829 (2nd Cir. 1976). The *Ake* court grounded its due process analysis on concepts of equal justice and equal protection (*Lee*, 1992).

The Supreme Court has also recognized a constitutional duty in the area of disclosure. There are two separate and distinct potentials for prosecutorial abuses, using false testimony and suppression of exculpatory evidence. The second, suppression of exculpatory evidence, is an issue involved in the instant case. However, in *Imbler v. Pachtman* (424 U. S. 409 (1976)), the majority noted that it is a distinction which "is not susceptible to practical application" (at 431, *n.* 34.). In *U. S. v. Agurs*, (427 U. S. 97 (1976) the Supreme Court described the level of materiality required of evidence before its suppression reaches constitutional dimensions as the creation of "a reasonable doubt that did not otherwise exist"(at 112). Scientific evidence that meets the requirements of *Daubert*, when offered by a defendant, will always be intended to support a reasonable doubt and may often engender reasonable doubt when offered to the finder of fact and understood. Behavior by prosecutors and adversaries which results in either a trial decision based upon defamatory and false impeachment that excludes scientific expert evidence or unavailability of experts because of the high risks involved in testifying when subjected to unlimited defamatory attacks is therefore a violation of the constitutional rights involved in disclosure and suppression of exculpatory evidence.

In *New Jersey v. Michaels* (136 N.J. 299, 642 Atlantic Reporter, 2nd, 1372) the New Jersey Supreme Court accepted the responsibility to ensure reliability of evidence admitted at trial. "That concern implicates principles of constitutional due process. 'Reliability (is) the linchpin in determining

admissibility' of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment. (*Manson v. Braithwaite*, 432 U.S. 98, 114, 97, *S. Ct.* 2243, 2253, 53, L.Ed.2nd 140 154 1977). Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived freom unreliable sources due process interests are at risk" (p. 1380). The Court finds that the investigation and the therapy of the children so contaminates the evidence that it requires a taint hearing if the defense can demonstrate a substantial likelihood that adult influence has affected statements by children and imposes a burden of proof on the State to show the statements are reliable enough to be admitted. The Court details the ". . .egregious prosecutorial abuses" (p. 1385) and illustrates them with summaries of several interviews. In demonstrating the need for a taint hearing and in rebutting a State's claim of reliability a defendant must have the assistance of a competent mental health scientist and be able to present scientifically sound testimony. To be prevented from doing so would be a violation of due process. Therefore defamatory personal attacks on experts and improper and false impeachment tactics, of necessity, involve this constitutional issue.

In the issues the National Congress attempts to deal with involving the most intimate and basic of human relationships, the family, and the level and nature of state intrusions into the family, the most primitive and atavistic emotions of all those involved are elicited. This imposes a special burden on prosecutors and other agents of the state to aim at the highest levels of reason and responsibility. A prosecutor is prohibited from seeking convictions at any price. The prosecutor is viewed as a "minister of justice" whose obligation is to guard the rights of the accused as well as to enforce the rights of the

public. The prosecutor is held to an even higher standard in sexual abuse cases due to the inherently emotional reactions evoked in such cases (*State v. Danielson*, 377 N. W. 2d 606 (Minn. App. 1985); *State v. Jahnke*, 353 N. W. 2d. 606 611 (Minn App. 1984)). The same expectation of increased awareness of the level of emotional involvement can be deemed necessary for all adversaries seeking to use our system of justice to resolve these most difficult and complex cases. The judiciary also must take into account the different nature of legal disputes arising out of the nature of family life and the intimacies therein. The importance of resolution of disputes in this area is vital to the welfare of any nation state. This was expressed by St. Augustine centuries ago.

"The union of male and female is the seed-bed, so to speak, from which the city must grow. . .Since, then, a person's home ought to be the beginning or elementary constituent of the city, and every beginning serves some end of its own, and every part serves the integrity of the whole of which it is is a part, it follows clearly enough that domestic peace serves civic peace, that is, that the ordered agreement of command and obedience among those who live together in a household serves the ordered agreement of command and obedience among citizens." (Augustine, *The City of God*, 15,16,19,13.)

Summary of Argument

The core issue in this case is the defamation of expert witnesses by the prosecution and other adversary attorneys. In the instant case, there is no disagreement about the defamation of the plaintiffs by the defendants. Twice Judge Shabaz, District Court, observed that the actions of the defendants were defamatory as fact and as law. Twice the

decision of the Appellate Court describes the behavior of the defendants as defamatory.

> "Like the district court we shall assume that at least some of the statements are untrue and defamatory. Cf. *Moldea v. New York Times Co.*, 15 F3d 1137 (D. C. Cir. 1994). Affidavits offered in opposition to the motion for summary judgment create a material dispute on the truth of the statements. (p. 5). . . the fact that both Salter and Toth have continued publishing the defamatory statements. Salter's monograph remains in circulation and she continues to pass out copies of the *Mr. Bubbles* tape. Toth frequently lectures on the subject of child molestation and she continues to use the *Mr. Bubbles* tape as part of her presentation (p.10)."

There is no dispute that the defendants continue to publish the defamatory statements after the initiation of the law suit and, indeed, up to the present moment. They continue to advertise and distribute their defamamatory material to this very day. The defendants continue to maintain their posture of belief that the statements are true in the face of the disconfirming evidence supplied by the plaintiffs and their own admissions that what they claim has been said by the plaintiffs has not been said.

Nevertheless, the district and appellate courts have ruled that the heightened standard of actual malice of New York Times for media defendants is applicable.

> "A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops. Both Salter and Toth came to

> believe that Underwager is a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment.. Persons who hold such opinions cannot be expected to look kindly on their subjects, and the law certainly does not insist that they shut up as soon as they are challenged (p. 10)."

However, does this include teaching and distributing untrue and defamatory material about an expert witness to prosecutors and others who then bring it into the courtroom and use it in the effort to impeach experts?

If the the *New York Times* standard of actual malice is extended to include attorneys, scholars, and others who teach prosecutors and adversary attorneys to impeach experts in the courtroom by falsehood, innuendo, and lies, and the proof of actual malice can be defeated by a defendant simply asserting, "I believed it to be true," the effect on the process of justice is devastating. It can only greatly increase the level of error in judicatory decisions. The effect of this decision is to give a hunting license to the government and to any adversary to attack by any means, fair or foul, any experts who may have scientific data and knowledge which, for whatever reason, the government or adversary does not find convenient. It raises the power of the office of prosecutor to an absolute level for it removes any possibility of accountability for redress if zealotry or blind ambition lead to excesses.

The suggestion by the *Imbler* majority that abuse of prosecutorial immunity can be deterred by the criminal analogue of § 1983, 18, U. S. C. §242 is unrealistic. This is shown by the fact that there are only a few reported cases of 18 U. S. C. § 242 being used against a prosecutor. The

difficulty in persuading a prosecutor to prosecute a colleague is self-evident. The potential of an ethical reprimand is just as uncertain as a criminal sanction. Disciplinary committees must deal with legal standards of materiality and subjective interpretations of due process cannot be the basis for ethical sanctions. There is no feasible source of accountability for a decision to suppress evidence helpful to a defendant (*Beatty, M. L.* (1981). The ability to suppress exculpatory evidence: Let's cut off the prosecutor's hands. *Idaho Law Review*, 17, 237–248.) If permitted to stand the Seventh Circuit decision in the instant case removes the last possibility for any redress or any consequence for behavior which is clearly wrong. There is no way this would not lead to an increase in abuse of the power of the prosecutorial office and the position of adversary. The certain outcome of that is greater and more frequent injustice.

There will be fewer and fewer scientists willing to take the abuse and suffer the assault to their reputations in order to assist in the defense of a citizen charged with a crime of any sort. This outcome is all the more likely because the defendants have made their purpose crystal clear in their Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions. On pages 5–6 of this Memorandum the defendants describe the National Center for Prosecution of Child Abuse and its services. They claim the Center is nonprofit and provides a necessary service for prosecutors to assist them to prepare for dealing with experts the defense presents. Then they include this paragraph:

> **"Likewise, the more prepared prosecutors are for expert witnesses who make their living testifying only on behalf of child molesters (and essentially adopting theories attendant to their**

source of income) the less effective, and less commercially desirable, the expert will be for future alleged child molester defendants (p. 6)."

This, together with their publication of a "hit list, as Toth termed it, with fifty names of persons they label defense experts, demonstrates the conviction that anyone who opposes them is a pure mercenary and they intend to damage them financially.

Finally, the only scientific experts appearing in the courtroom will be those who maintain whatever line the government has determined suits its purposes. At that point, rather than the solid scientific knowledge which the *Daubert* decision aims at, there is likely to be a variant of Lysenkoism. Trofim Lysenko, in the Soviet Union in the 1930s, promoted a theory of genetics assuming the inheritance of acquired characteristics. This concept was favored by the state because it permitted the false hope of the new Soviet man and woman rising to ever more faithful service to the state. Lysenko enjoyed a few years of fame and fortune as a lionized servant of the state. The effect on the nation, however, was to cripple severely the agricultural economy and destroy scientific genetics in the Soviet Union for years.

In the specific area the National Congress is most concerned with, family life, the effect would be to foster unscientific, unsupported, and erroneous views which can masquerade as science in the courtroom. The scientific approach of the plaintiffs is generally accepted in the scientific community. This fact is demonstrated in articles such as *Ceci & Bruck*, 1993, *Kassin, Ellsworth, & Smith*, 1989, and the plethora of recent research which supports the understanding that claims of child abuse must be dealt with very cautiously if they are uncorroborated. Across a broad

area the most recent research is accumulating to demonstrate that what the plaintiffs wrote in their 1988 book is correct and supported more and more strongly.[1]

The end result of this process of prosecutors and adversaries attacking and defaming expert witnesses who offer scientific facts contrary to received wisdom is to defeat the interest of this Court in having reliable scientific knowledge available in the courtroom and to deny to those persons on the politically incorrect side of any controversial issue due process, equal justice, and equal protection. It is to encourage and support the most vulnerable and seductive side of the role of prosecutor, the corruption of absolute power with no accountability and no controls.

We strongly urge this court to consider the overall effect of extending the heightened standard of actual malice to prosecutors in the courtroom and in their attacks on expert witnesses outside the courtroom. It is not too much to require

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[1] The prosecution and the child protection system has locked itself into supporting and advancing assertions that are now shown to be unfounded, These include concepts popularly understood, such as children cannot lie, or do not lie, about sexual abuse. Children cannot talk about things they have not experienced. Child abuse, including sexual abuse, is an epidemic. The state can provide adequate safety and care of children. Children should always be raised by mothers. Children are no more suggestible than adults. Children cannot be led to produce false central details of events that did not happen. Children can be questioned by adults repeatedly in a leading and coercive fashion but still produce spontaneous and reliable statements. Most people who interview children do not use leading and suggestive approaches. Domestic violence is a gender problem and men are the ones who do violence to women. Claims of recovered repressed memories of childhood abuse are true. Even if you do not remember you were abused, that is evidence you were, and if you feel like it, then you have been.

that all the persons involved in the courtroom in the search for justice play by the same rules. When every witness is required to swear an oath ". . .to tell the truth, the whole truth, and nothing but the truth" to exempt the prosecutor or adversary from the simple, plain duty to be truthful and accurate in statements, implications, and innuendo cannot advance the cause of justice nor aid in making the most accurate decisions possible. To permit and encourage irrational, dogmatic, and erroneous attacks on scientific knowledge in the courtroom and to have no way to control such attacks is to defeat the nature and purpose of science.

If it should be that the court determines the heightened standard of New York Times is applicable, in the alternative, we strongly encourage the court to establish that republication of defamatory material after suit is evidence of actual malice. This would be in keeping with the opinion of this court regarding ". . .persistent conduct after suit. . ." in *Farmer v. Brennan*, 128 Lawyers Edition, 2nd, 811. In the instant case, after suit, Toth republished the defamatory videotape thirteen (13) times in ten states. The APRI National Center for Prosecution of Child Abuse continues to this day to send out and publish the defamatory material of Salter's monograph. They continue to send material to anybody who asks for information to harm the plaintiffs, not just to prosecutors as their policies claim.

It is true, as the appellate court's ruling reads, that "Scientific controversies must be settled by methods of science rather than by the methods of litigation (p. 11)." However, scientific methodology does not include defamation, character assassination, nor asserting falsehood to be truth. It does not include private publication and private circulation of false and defamatory attacks upon other scientists. If a non scientific party, which consumes science,

can be involved in the doing of science and introduce falsehood into the practice of science with great power and authority, the capacity for mischief is incalculable. Therefore we urge this court to accord to scientific experts who are willing to enter the adversarial system to provide scientific knowledge nothing more than the ordinary recourse open to all other citizens—the opportunity in our system of justice to demonstrate and establish for a jury of their peers their probity, veracity, and truthfulness if challenged and attacked.

Argument

I. There is ample case law and precedent establishing a standard of accuracy, fairness, and truthfulness in attempting to impeach an adversaries expert witnesses and refusal to permit innuendo or implications of some form of wrong doing to be used to deny a defendant a fair trial.

The most frequent attack made on an expert is that of being a "hired gun" who testifies in whatever way the payee wants. The Supreme Court of Michigan (*Michigan v. Tyson* (1985), Supreme Court of Michigan, Docket No. 73774, Calendar No. 25. 377 N.W.2d 738 (Mich. 1985) ruled that a "prosecutor's statements . . . to the effect that the defendant's psychiatric expert had testified only because he was paid to do so, was misconduct so prejudicial that it denied defendant a fair trial" (p. 745) . . . "was not cured . . . and therefore reverse defendant's conviction" (p. 746).

A Michigan appellate court (*Shemman v. American Steamship Company* (1979). Court of Appeals of Michigan, Docket No. 77-2239. Mich.-App., 280 N.W.2d 852) ruled that "improper innuendoes" about expert witnesses constitute a "studied purpose to prejudice the jury and divert the jurors'

attention from the merits of the case" (p. 857). "Witnesses should not be subjected to personal attacks and unsubstantiated insinuations. Each party is entitled to present its case on the merits, free from remarks of opposing counsel which may prejudice the jury and divert its attention from the real issues" (p. 858). The court then ruled that the "cumulative effect of the improper arguments and innuendoes . . . was so highly prejudicial that we conclude defendant was denied a fair trial" (p. 859). When jurists recognize the serious impact of such implications on the effort to do justice, it cannot be that the claim these are mere opinions has merit or can be sustained.

The New York State Human Rights Appeal board (*Taormina, C. v. Goodman, S. S.* (1978). No. 406 N.Y.S.2nd 350. Supreme Court, Appellate Division, Second Department.) held "For example, at one point counsel stated that one of defendant's experts was known in the community as 'here come Howie' and implied that he would offer any testimony which might be desired for a price. . . We believe, that standing alone, the cumulative effect of these improper remarks would require a new trial." (p. 352)

Although the Supreme Court of North Carolina did not hold it to be prejudicial error, it did observe (*State v. Rosier, H. W.* (1988). No. 331A86. Supreme Court of North Carolina) that an implication that an expert witness was paid ". . .need not imply that he would not testify truthfully." Therefore, the remarks by the prosecutor were not prejudicial enough to warrant reversal. The Supreme Court of New Jersey (*State v. Rose, T.* (1988). No. 112 N.J. 454. Supreme Court of New Jersey) reversed the death penalty because of the improprieties of the prosecutor during the opening and closing remarks in the sentencing phase. The remarks included implications that the expert was told by defense counsel how

to testify, The Illinois appellate court (*State v. Coulter, D.* (1992). No. 1-87-3175. Appellate Court of Illinois First District, First Division. held that when the state attacked the honesty of defendant's expert witness, an attorney cannot insinuate that a witness is untruthful because he is paid by the opposing party. In *Stamos, P. J., Perlin, J. & Hunter, M. L. v. Sukkar, F.* ((1982). N. 482-0054. Appellate court of Illinois, Fourth District) the court observed "Illinois courts have taken a dim view of counsel impugning the integrity of physicians testifying as expert witnesses. . .a parallel was suggested between the TV character in "Have Gun Will Travel" and the doctor who has 'medical testimony will travel'. . .These remarks were clearly improper, , , Counsel went beyond merely noting compensation and its implications as to his credibility, to suggesting he was a 'professional witness'. . . and a 'hired gun' ."

The Supreme Court of Nevada (*Sipsas, W. v. State* (1986). No. 14927. Supreme Court of Nevada.)went a bit further in determining that a prosecutor's remarks, even though defense counsel did not object, were so ". . . prejudicial as to require court intervention *sua sponte* to protect the defendant's right to a fair trial. The prosecutor ". . .notwithstanding the rules of professional conduct prescribed under Supreme Court Rule 188(4) the prosecutor expressed the following vituperative remarks during closing argument: 'Now that brings us to [sic] Dr. Jindrich. The Hired Gun from Hot Tub Country. Have stethoscope, will travel. . . .I think Dr. Jindrich is a living example of Lincoln's law. You can fool all of the people enough of the time.' " The conviction for first degree murder and child abuse was reversed and a new trial required. The New York Supreme Court (*Berkowitz, E. et. al. v. Marriott Corporation* (1990). No. 163 A.D. 2nd 52. Supreme Court, Appellants Division, First Department.) mandated a new trial in an action for damages for personal injuries because of

plaintiff's counsel's remarks ". . .in an unfair and highly prejudicial attack upon credibility and competence of defendant's expert witnesses. . .were repeatedly depicted as hired guns who were brought into litigation to'fluff up the case'." In *Clark, R. v. New York City Transit Authority.* (1992). No. 580 N.Y.S.2nd (AD. 1 Dept.). Supreme Court, Appellate Division, First Department) held that in attacking the testimony of the expert trial counsel acted improperly as an unsworn witness when he said that the testimony of the witness was "'false, absolutely false, and misleading'. . . It is error for trial counsel to bolster his case on summation by by repeated accusations that witnesses on the other side are liars. . . It is error for trial counsel to accuse medical experts, without supporting evidence, of being willing to testify for a fee. . . 'is nothing but a paid expert who will say anything whatsoever without regard to what is right, without regard to what is truthful' "

In another case (*People v. Rodriguez,* N. Y. L. J., 192:1 August 17, 1984) the appellate court censured the prosecutor for repeatedly resorting to ridicule and sarcasm in order to impeach the the credibility of the defense's psychiatric expert witness. "Do you always diagnose people as crazy based on this type of guesswork, Dr.? . . .Doctor, is it a symptom of some form of psychosis when a man can't answer a straightforward yes or no question? . . .Let's hear it, Doctor. Run through your routine." The Florida Supreme Court (*Nowitzke, F. v. State* (1990). N. 71729. Supreme Court of Florida.) ruled that "It is improper to impeach an expert witness by eliciting from another witness what he thinks of that expert. . . 'A trial should not be turned into a debate on irrelevant and immaterial issues such as the reputation of one expert witness as determined or judged by the personal opinion of another expert witness for the other side.' The introduction of Dr. Szasz' opinion was clearly erroneous. It also violated

Nowitzke's constitutional right to confront witnesses [Szasz was not a witness and absent]."

The quotation above, from the Defendants' Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions, p. 5–6, makes it clear that the attitude of the defendants is that all defense expert witnesses are "hired guns" and that their intent is to harm them.

The oft quoted dictum "He may prosecute with earnestness and vigor—indeed, he should do so. But while he [the lawyer] may strike hard blows, he is not at liberty to strike foul ones" (*Berger v. United States*, 295 U. S. 78 (1935)) expresses simply what should be the standard for dealing with expert witnesses. Anyone who willingly and voluntarily goes into the adversarial world of the courtroom can accept hard blows but fair and deal with it. That is not the problem. It is the foul blows that cannot be canceled or overcome. It is the untruthfulness that is spread about through gossip and through workshops and seminars and writing that cannot be countered or responded to in any effective manner that will have the effect of depriving defendants of adequate expert scientific assistance and thus deny them a fair trial. There should not be any greater latitude allowed outside the courtroom than in it. If falsehood and defamation are spread about outside the courtroom, it will find its way inside at some point.

II. Depriving the defendant of the right to have qualified experts to assist in presenting the defendant's version of the facts denies him or her due process under the law.

Effective deprivation of the right to qualified expert assistance can come about through indirect actions that make it impossible or very difficult. The right to have expert assistance, as this court has defined it, is an empty right with no substance if the rightful assistance is not available. This is the effect of the attacks of prosecutors on experts even now without the hunting license afforded by the appellate decision in the instant case. A survey of experts in child sexual abuse cases (*Underwager, Wakefield, Legrand, Bartz, & Erickson*, 1986) demonstrated that mental health experts who testify for the defense in cases of alleged sexual abuse of children share similar experiences. With one exception, every respondent reported being isolated, criticized, characterized as hired guns, and targeted for slander and innuendo. There were efforts to blacklist them, interfere with referrals, cancel their classes and workshops, cut off funding sources for research projects, and, in one instance, deliberate dissemination of the false claim of a homosexual relationship with the defendant. One respondent testified for the first time for a defendant. The consequence was that his office was picketed by angry adults claiming he was supporting pedophiles. That was his first and last time.

Every respondent but one also reported observing instances of prosecutorial misconduct ranging from simply withholding exculpatory evidence to breaking in to a judge's office and rifling his files which resulted in his being removed from the case (*Wakefield & Underwager*, 1988). It is not simply a matter of venal or unethical prosecutors. Rather it is the nature of the role of prosecutor itself that generates the greatest pressure to misconduct. The prosecutor can never be wrong. He or she must believe that every person whom they prosecute is guilty since they cannot work for the conviction of an innocent person. This pressure is omnipresent because it is built into the system. The pressure will be strongest in the

self-righteous prosecutor and everything in the justice system compels the prosecutor to believe in the rightness of the cause (Jonakait, R. N. (1987). The ethical prosecutor's misconduct. *Criminal Law Bulletin*, 23(6), 1987).[2]

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, 410 U. S. 284, 294, 93, S. Ct.. 1038, 1045 1973). To deprive an accused of the ability to present witnesses in his own behalf is to subject him to a trial that is so fundamentally unfair as to deprive him of the due process guaranteed by the Fourteenth Amendment of the Federal Constitution. See *Washington v. Texas*, (388 U. S. 16, 19, 87, S Ct. 1920, 1923, 1967) "The right to present the defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies . . .is a fundamental element of due process."

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[2] According to law professor, Gideon Kanner, ". . .deception, nastiness, intimidation, and general lack of civility among lawyers are increasingly permeating the litigation process . . . In the real world trickery succeeds all to often . . . Lawyers are by and large neither stupid nor irrational. They do what they think will help their case and what they think judges will let them get away with. . . When judges don't care enough about the ethical quality of the litigation process to deal with outright misconduct effectively, there is little hope. . . It is therefore indefensible for judges to wash their hands of problems and let the litigation process seek its lowest tolerable level. That is nothing short of a surrender to the barbarians among us. . . Judges ask that we pay homage to them by rising when they enter a courtroom and by addressing them as 'Your Honor.' Judges are the only officials in our government who can summarily imprison citizens for being rude in their presence. To justify these prerogatives, judges owe us something in return. At a minimum they owe us a fair hearing, untainted by tolerance of abuse, intimidation, and deception., They owe us – you should pardon the expression – justice." (Kanner, G. (1991, September). Rambo, go home: Of ethics, tactics, and judges. *Trial*, pp. 104–106.)

Our system of justice requires a complete presentation of the relevant facts. The Supreme Court has stated:

> "We have elected to employ an adversary system of justice in which all parties contest before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecutor or by the defense." *United States v. Nobles*, 422 U. S. 226, 230-231, 45 L. Ed. 2d. 141, 149, 92, S. Ct. 2160, 2166 (1975), quoting *United States v. Nixon*, 418 U. S. 683, 709, 41 L. Ed. 2d 1039, 1064, 94, S. Ct. 3090, 3108, (1974).

Given that the right to present evidence is a fundamental one, the state must show that it has a compelling interest in extending the heightened requirement of actual malice to attorneys and scholars that overcomes the defendant's rights. Thus far the only interest the Seventh Circuit decision describes is the pocketbook and/or purse of the scholars and prosecutors. After claiming that media companies ". . .reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business . . ."(p. 8), the appellate court goes on to opine that "Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one

side's arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants" (p. 8). Silencing defamatory attacks, decreasing the level of falsehood, increasing the fairness of the process, and supporting accuracy in decision making is exactly what case law about improper and proper impeachment is about. It is what all of defamation law is about. Surely a defendant facing long term or even life imprisonment, loss of children, destruction of family, impoverishment and bankruptcy, destruction of career, loss of friends, social isolation and hostile, judgmental attitudes from society for all of life is not likely to feel fairly treated when the wealth and comfort of attorneys and scholars is valued above his rights and liberty interests.

III. There is sufficient repetition of the pattern of improper attacks upon scientists and expert witnesses by prosecutors, attorneys, and their allied scholars and interference in the normal conduct of science to warrant grave concern. The repeated behavior pattern justifies maintaining, at the very least, the last possibility for redress available to a scientist who believes an unfair attack has been made. That is access to defamation law and the distinction between media defendants and non media defendants so that attorneys and scholars are not given the heightened standard of New York Times of requiring actual malice.

Nature, (Anderson, C. (1991). DNA fingerprinting discord. *Nature*, 345, 500.) one of the oldest and foremost scientific journals in the world, published in the U. K., reported on the behaviors of American prosecutors, FBI officials, and their allied scholars, to interfere with scientific

publication, peer review, and intimidate and harass defense experts who were critical of DNA techniques in forensic settings. When DNA experts Lewontin and Hartl had an article critical of using DNA probabilities in forensic settings accepted for publication by *Science*, prosecutors attempted to intimidate and frighten them in several phone calls, then tried to get the article suppressed and coerced the editor of *Science* to publish hastily a non peer reviewed rebuttal by two scientists allied with the prosecution. The prosecution also elicited false and misleading testimony from Dr. Daiger and Dr. Caskey who concealed their grants from the Department of Justice to study DNA. Both grants were to study the very issues the defense was criticizing which would have falsified the prosecutions claim that the questions were resolved. These examples demonstrate the power of the government to shape and mold scientific testimony. These efforts to interfere in the procedures of science and harass experts were confirmed by *Science* (Roberts, L. (1991). Fight erupts over DNA fingerprinting. *Science*, 254, 1721–1723).

Further extensive efforts to intimidate and harass DNA experts were reported by Kolata (Kolata, G. (1991, December 20). Critic of DNA tests tells of pressure to withdraw. *New York Times*, A16). Foreign scientists have had their visas questioned, threatened with imprisonment, and prosecutors have attempted to discredit their work with false claims of misrepresentation and flawed procedures, much as in the instant case. In one instance, a scientist was falsely accused of fraud in his billing practices. Dr. W. Thompson, UC Irvine, spoke of an unethical pattern of intimidation aimed at scientists. He sees that when the prosecutors cannot attack the science, they attack the person. "So the prosecutors are telling the courts that the critics are unethical, that they are charlatans, that they are bad" (*Kolata*, 1991, p. A16). One scientist who is critical of DNA forensic use, reports he was

threatened with having a rumor spread that he is a closet homosexual.

In addition to intimidating and harassing experts, prosecutors use the ability to dispense research funding to support research expected to be favorable. The Director of the National Institute for Justice routinely solicits advice from the FBI before awarding forensic science research. An FBI representative participated directly in the external review process in which grants were awarded to two DNA scientists who later falsely testified they had no connection with the prosecution and no grants. This false testimony was knowingly elicited by the prosecution (*U.S.A. v. Stephen Yee, et al.* (1991). Motion for new trial.)

> "The conduct of the government in this matter, particularly the actions of AUSA Wooley, constitutes an unlawful and unethical effort to intimidate defense witnesses, retaliate against them for their testimony and their scientific opinions, and to tamper with their most precious tangible property, their scholarship. . .What must be stressed, however, is that the government's misconduct here . . .is not isolated event, or just the ill considered, impetuous action of an overzealous prosecutor in the heat of battle. . .The attempt to prevent, alter, and undermine publication of the article by Drs. Hartl and Lewontin was part of a broad national campaign by federal and state law enforcement officials to intimidate, harass, and deter expert witnesses from testifying against the FBI and other forensic DNA laboratories and publishing their views. . .By far the most troubling aspect of the government's campaign is its direct interference in the publication and peer review

process where an effort is being made to prevent and undermine the publication of scientific opinions law enforcement does not like" (pp. 24–25).

In a review of 8000 criminal jury trials Kalven and Zeisel (Kalven, H. & Zeisel, H., 1966. *The American Jury*. Boston, Little Brown) report that scientific evidence of every kind save one was far more frequently offerred by the prosecution than by the defense. The single exception was psychiatric testimony in an insanity defense. *Saks* (1989) reports that 80% of the nation's crime laboratories are located within police agencies. This suggests that an even higher proportion of forensic science is carried out within and paid for out of police agency budgets. He considers this to be grounds for serious concern about undue command or cultural influence on forensic science and concludes that "The neutral fact finding norms of science are incompatible with the crime fighting culture of police agencies"(p. 788). A review of a National Institute of Justice custom search of Federal Criminal Justice Research Data Base for all federally funded research grants using the index terms Child Abuse, Abused Children, Abusing Parents, and Prediction produced over 500 grants. Every one was clearly prosecution oriented. This finding demonstrates the powerful way in which government can affect the scientific enterprise.

It is firmly founded case law that where a conviction is obtained through the use of false evidence, due process has been denied. It makes no difference whether the prosecutor actually knew the testimony was false or should have known it was false (*Miller v. Pate*, 386 U. S. 1 (1967); *Chapman v. California*, 386 U. S. 18 (1967); *Napue v. Illinois*, 360 U. S. 264 (1959); *Giglio v. United States*, 405, U. S. 150 (1972). Where the prosecutor knows or should have known the testimony was false, the conviction should be set aside if

without it the jury *might* have reached a different conclusion. (*Wright, Federal Practice and Procedure*, Criminal 2d, Section 557.1; Gordon v. United States, 178 F. 2d. 896, 900, (6th Cir. 1949), *cert denied* 339 U. S. 935.) The standard, "might have reached a different conclusion is far less demanding than "will probably produce an acquittal." It is a fully logical extension of this principle to apply it to prosecutorial use of false impeachment material to induce a jury to discount defense expert witness testimony. If a prosecutor knows or should have known that material used to impeach a defense expert was false but goes ahead and uses it, the jury might well have reached a different decision without the use of fraudulent material. The right to due process has been denied the defendant when such a practice is followed.

Kolata (1991) reports that many scientists say they will no longer testify because it is simply too stressful. The Carnegie Commission on Science, Technology, and Government report underlying the Daubert brief contains data showing most scientists will not get involved in testifying in court (*Gallagher, S. G.* Personal communication, June 19, 1994). In a survey of forensic psychiatrists (N = 408), Miller, (1985; The harassment of forensic psychiatrists outside of court. *Bulletin of the American Academy of Psychiatry and the Law*, 13(4), 337–343) reports that 43 % of all harassment was committed by judges and attorneys, 19% of the threats of actual physical harm, and 14% of the actual physical attacks. This is an alarming level of unethical harassing behavior by judges and attorneys. Winfree (1987)(Winfree, L. T. (1987). All that glitters is not necessarily gold: Negative consequences of expert witnessing in criminal justice. *P. Anderson & L. Winfree* (Eds.). *Expert Witness* (pp. 138–153). Albany, New York, State University of New York Press) report a study of the consequences to experts of testifying in

the criminal justice system. The conclusion is that experts ". . .put more than just their professional reputations in jeopardy. . . . A sizeable minority—between 22.2 percent and 29.3 percent—reported problems ranging from minor harassment to major reprisals. . ." in their work and home communities. Winfree further concludes ". . . Citing any of the above reasons for not wanting to get involved is to abandon the judicial system to perhaps the less competent expert who will practice a somewhat questionable brand of social science" (p. 153). The Board of the National Association of Criminal Defense Lawyers has expressed concern about the great difficulty in finding experts willing to testify in DNA cases and capital cases. In the McMartin case in California, the defense had to go to England to get Dr. D. Paul to testify after Dr. Robert ten Bensel, University of Minnesota, was so intimidated and harassed by the prosecution that he withdrew as an expert (*Buckey, et al.*, 1990). If the efforts of prosecutors, attorneys, and allied scholars succeed in sharply limiting the number and quality of scientific expert opinion available to a defendant, here, too, the right to due process is being denied, albeit indirectly, but nevertheless quite effectively.

Conclusion

In this brief, *amicus* has explored the consequences of extending the heightened requirement of New York Times for demonstration of actual malice to non media defendants who defame and attack defense experts. We believe the consequences will be disastrous for this court's purpose to have solid and credible scientific knowledge available to the justice system as evidenced in the *Daubert* decision. We believe the consequences will be to deny to a defendant access to competent mental health professionals as this court defined the right in *Ake*. We believe the consequences will be harmful

to the venture of science if the government's efforts to shape and mold scientific inquiry to suit its purposes are not checked. We believe the consequences will be to deny constitutional rights of due process to defendants, We believe these consequences can be avoided by the simple act of allowing expert witnesses the same level of redress and protection from defamation as all other citizens have.

For these reasons the Court should clarify the standard to be used in determining the level of malice required for non media defendants in defamation actions. The Court should also clarify the impact of republication of defamatory material after suit in relationship to the standard of actual malice.

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